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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 302	)	CS Docket No. 96-46
302 of the Telecommunications	)	
Act of 1996	)	
	)	
Open Video Systems	)	

REPLY COMMENTS OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION

The California Cable Television Association ("CCTA"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits these Reply Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1/]

INTRODUCTION

In its opening Comments, CCTA set forth a model of appropriate regulation for open video systems ("OVS") that both meets the articulated statutory requirements and serves the identified public interest goals.[2/] These Reply Comments address three limited points: (1) the need for well-defined and specific rules regarding discrimination and the certification process; (2) the need for comprehensive and verifiable cost allocation data prior to OVS operator certification for joint-use integrated network facilities; and (3) the need to ensure

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[1/] Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, FCC 96-99 (rel. March 11, 1996) ("NPRM").

[2/] Joint Comments of Cablevision Systems Corporation and the California Cable Television Association, CS Docket No. 96-46 (filed April 1, 1996) ("Cablevision/CCTA Comments").

that all Title VI statutory obligations are imposed upon and enforced fully against OVS operators.

I. The Commission Should Adopt Specific, Verifiable and Prospective Regulations to Prevent Discrimination

In their opening Comments, numerous parties[3/] agreed with CCTA's assertion that specific, verifiable, and prospective regulations for OVS are essential if the FCC is to fulfill the Congressional goals of increased competition in the video marketplace and the availability of diversified programming choices for consumers.[4/] The local exchange carriers ("LECs"), however, urged the Commission instead only to adopt rules that proscribe discrimination in the most general terms, either by simply codifying the language of the 1996 Act,[5/] or by adopting a rule that would generally state that discrimination is barred.[6/] Under these approaches, the FCC would adjudicate claims of discrimination on a case-by case basis.[7/]

For the reasons set forth in CCTA's opening Comments, such an approach will fail to achieve the goal of non-discriminatory deployment and operation of OVS and will instead re-insert the FCC into the case-by-case regulatory quagmire that it experienced with video

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[3/] See, e.g., National League of Cities, et al. Comments at 11; New York Department of Public Service Comments at 3-4; Motion Picture Association of America, Inc. Comments at 4.

[4/] See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 172-173 ("Conference Report").

[5/] Comments of Bell Atlantic, BellSouth, GTE, Lincoln Telephone, Pacific Bell, and SBC Communications at 6, 9 ("Joint LEC Comments"); United States Telephone Association Comments at 7-9.

[6/] NYNEX Comments at 26; Joint LEC Comments at 6; U S WEST Comments at 6.

[7/] See Joint LEC Comments at 6; U S WEST Comments at 6.

dialtone.[8/] Indeed, if the video dialtone experience teaches anything, it is that clearly defined rules are critical to efficient service deployment in the public interest.[9/] Yet, essentially what these LECs now urge is that the FCC re-adopt its video dialtone regulatory rubric promulgating only a general framework with the real-world deployment decisions to be reviewed on a case-by-case basis.[10/] Given the Congressional direction that the FCC not follow the video dialtone implementation model,[11/] the FCC should reject such an approach.

Notably, what the LECs now characterize as "regulatory flexibility"would allow the same types of anticompetitive behavior that was the bane of video dialtone.[12/] For example, as CCTA previously demonstrated with respect to channel capacity and channel sharing, the LECs' consistent method of operation was to allocate all or substantially all of

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[8/] See Cablevision/CCTA Comments at 9-10.

[9/] For example, in the video dialtone context, there was initially significant uncertainty regarding the amount of capacity that any one video programmer could acquire. In the Matter of New Jersey Bell Telephone Company, File No. W-P-C 6840, 9 FCC Rcd 3677, 3680 n.44 (1994). Once the FCC stated clearly that no one programmer could acquire more than 50% of capacity, this aspect of video dialtone became a self-enforcing rule. Id.

[10/] See, e.g., Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5789, 5840 (1992) (Commission initially set only the necessary "broad regulatory framework" and relied upon the case-by-case analysis of individual deployment proposals for specific rules); Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 313 (1994) (generally affirming policy of scrutinizing video dialtone applications on a case-by-case basis).

[11/] See Conference Report at 179 (FCC's video dialtone rules created substantial obstacles to the actual operation of video systems).

[12/] See Joint LEC Comments at 6.

the capacity to affiliated or favored video programmers.[13/] Unless the FCC clarifies precisely what is expected and what will and will not be tolerated, there is no basis to conclude that the motives of these same LECs, nor their ability to act on them, will change. Indeed, with even less specific regulation, if anything, it is likely that the discriminatory conduct will be even more blatant. Despite what these LECs now urge,[14/] the current market alone will not suffice to ensure that the terms, conditions, and rates established by OVS operators will be either reasonable or nondiscriminatory.

Similarly, the FCC should reject the bare-bones approach to OVS certification that is being urged by many LECs.[15/] Given the extremely short time period for Commission and public review, only a certification process that elicits full information from the OVS applicant at the outset can serve to ensure that the prescribed statutory and regulatory directives are met. The certification applications should set forth full details of: (1) the proposed OVS system, including the means by which the channel allocation decisions will be made and the nature of the methods utilized; (2) how the channel sharing mechanisms will be separated from control by the OVS operator or its affiliate, the scope and specifics of affiliate relationships; (3) video programming contracts; and (4) most importantly, the specifics regarding assignment of the networks' components among voice, video and common accounts and the proposed cost allocation methodology, including the proposed full results of such cost allocation.

[13/] See Cablevision/CCTA Comments at 12, 14.

[14/] U S WEST Comments at 4-6.

[15/] See, e.g., Joint LEC Comments at vi, 31; USTA Comments at 20-21; NYNEX Comments at iv, 26-27; U S WEST Comments at 22-23.

By contrast, postponing review of this key information to a later stage will only result in post-deployment review of OVS proposals in the complaint process, which is ill-suited and inefficient for assessing basic suitability and public interest issues. Failure to review these crucial aspects of the proposed deployment before substantial deployment occurs will undermine the FCC's ability to ensure that the public interest is served.

As stated previously, the LEC incentives to discriminate are substantial and therefore, the FCC should adopt all reasonable measures to promote fairness and nondiscrimination. Therefore, CCTA also supports the proposals of many parties stating that separate affiliates are necessary to promote the public interest and limit anticompetitive conduct.[16/]

In addition to promulgating specific rules regarding the non-discrimination obligations of OVS operators and a clear and thorough certification process, the FCC should also adopt a dispute resolution process that allows a full and genuine opportunity for interested parties and the public to state and resolve complaints. In this regard, the Commission should soundly reject the LECs' suggestions that complaining parties meet a burden of showing "intentional discrimination that was commercially unreasonable and resulted in actual and substantial damage."[17/] Congress did not intend only that the Commission redress discrimination that results in substantial monetary losses or halt anticompetitive conduct only

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[16/] See, e.g., New York State Department of Public Service Comments at 2; National Association of Regulatory Commissioners Comments at 5.

[17/] Joint LEC Comments at 32-33. Incredibly, the LECs would have the FCC adopt both minimal non-discrimination regulations that afford maximum OVS operator flexibility together with minimal due process in the complaint resolution mechanism. USTA Comments at 12. The net effect, of course, would be to immunize themselves against any legitimate regulatory oversight.

after it has occurred. Rather, the FCC was expressly directed to promote nondiscrimination and just and reasonable rates, terms, and conditions.[18/]

II. The Commission Has an Obligation Under the 1996 Act to Require OVS Operators to Allocate Properly the Costs of Their Competitive OVS Offerings

As CCTA stated in its opening comments, the Commission has an obligation to require OVS operators to allocate the costs of their competitive OVS offerings in a cost-causative manner.[19/] To ensure that OVS "rates, terms and conditions" are nondiscriminatory and reasonable, the FCC must establish and enforce cost allocation procedures prior to OVS certification.[20/] In addition, the FCC must also engage in a thorough review of the actual costs of OVS operators in deploying joint-use facilities.[21/] In this regard, CCTA concurs wholeheartedly with the thrust of the comments of NARUC and the California Public Utilities Commission ("CPUC") that assert that specific cost allocation requirements are essential, as ratepayers should not subsidize the competitive offerings of the LECs.[22/]

[18/] 47 U.S.C. § 573(b)(1)(A). The FCC is directed to prescribe regulations that "ensure that the rates, terms, and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory."

[19/] Cablevision/CCTA Comments at 26.

[20/] See California Public Utilities Commission Comments at 12; see also NARUC Comments at 6; Home Box Office Comments at 20; New York Public Service Commission Comments at 4; Motion Picture Association of America, Inc. Comments at 8-9; National League of Cities et al. Comments at 8, 16.

[21/] Cablevision/CCTA Comments at 31. In this regard, CCTA supports the proposal of the National League of Cities, which asks the Commission to require that OVS operators file financial statements reflecting rates of return and cash flow. National League of Cities et al. Comments at 19.

[22/] NARUC Comments at 6; CPUC Comments at 12.

Not surprisingly, a majority of LECs asserted that the Commission need not impose any cost allocation requirements as a pre-condition for OVS certification.[23/] These LECs maintain that such allocation is unnecessary because the Commission's existing Part 64 rules "fully accommodate the joint provision of common carrier and non-common carrier services." [24/] Yet, as CCTA explained previously, the Commission's CAM process is insufficient, by itself, to address all of the cost allocation issues that arise with the deployment of OVS.[25/]

If the FCC wants to expedite OVS deployment and institute a process that resolves public interest issues at the outset, it must address cost allocation issues prior to certification. Significantly, CCTA's assessment was shared by U S WEST which asked the Commission to "reexamine Part 64 in light of large-scale regulated/unregulated operations that may be sharing a common infrastructure,"[26/] and which reasonably called for a "comprehensive approach to cost allocation."[27/] Accordingly, to ensure that telephone ratepayers do not subsidize telephone company entry into competitive video services, the Commission should

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[23/] See Joint LEC Comments at 31; NYNEX Comments at 22-23; U S WEST Comments at 7.

[24/] Joint LEC Comments at 31; see also USTA Comments at i, 13.

[25/] See Cablevision/CCTA Comments at 29.

[26/] U S WEST Comments at 8-9.

[27/] Id. at 9.

immediately implement comprehensive cost allocation rules prior to the filing of OVS certification applications.[28/]

III. The FCC Must Enforce Fully All Enumerated Title VI Provisions

Despite the clear statutory mandate of the 1996 Act, many LECs argue that the Commission should not require them to comply fully with their Title VI obligations because, as "new entrants" to the video programming marketplace, they are somehow entitled to the removal of additional regulatory barriers beyond those contemplated by Congress.[29/] For example, the LECs claim that OVS operators should not be required to comply with multiple state and local PEG requirements.[30/] In essence, the LECs envision OVS as "cable-lite,"[31/] providing the LECs with a way of getting into the cable television business without having to comply with any mandated public interest protections. While the 1996 Act reduced the regulatory burdens on OVS operators, Congress did not intend for the playing field to be so tilted.

[28/] In this regard, the Commission should evaluate whether a Federal-State Joint Board is necessary, as the cost allocation rules could well affect more than interstate costs. See NARUC Comments at 1.

[29/] See Telecommunications Industry Association at i, 3; Joint LEC Comments at 27. The statutory provisions already relieve OVS operators from such consumer protections as rate regulation, maximum rates for access, local government oversight for quality of service, consumer complaint mechanisms, and legal remedies.

[30/] Joint LEC Comments at 27.

[31/] The Alliance For Community Media, Alliance For Communications Democracy, Consumer Federation of America, Consumer Project on Technology, Center For Media Education, and People For the American Way Comments at 3.

As CCTA and others have already stated, OVS operators must be required to abide by PEG and other Title VI obligations just as today's incumbent cable operators do.[32/] These obligations include providing support for PEG services beyond mere channel capacity in order to meet the local needs of the communities they serve.[33/] In addition, in order to ensure the competitive parity that was envisioned by Congress, OVS operators should be required to pay fees comparable to those paid by cable operators.[34/]

[32/] See, e.g., Cablevision/CCTA Comments at 21; Tele-Communications, Inc. Comments at 17; Continental Cablevision, Inc. Comments at 3; City of Denver Comments at 4; National League of Cities et al. Comments at 31.

[33/] Cablevision/CCTA Comments at 21-23.

[34/] See National League of Cities et al. Comments at 45.

CONCLUSION

For the foregoing reasons, CCTA respectfully requests that the Commission adopt specific and well-defined prospective OVS regulations, establish and enforce cost allocation rules premised upon economically sound cost-causation principles, and require OVS operators to comply fully with all statutorily-mandated Title VI obligations.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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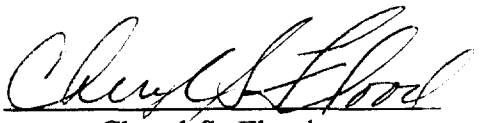

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